UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

May 9 and 10, 2002

May 9, 2002

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 1:10 p.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Item #1. Approval of the Minutes of the April 12, 2002 Commission Meeting.

The minutes of the April 12, 2002 Commission meeting were distributed to the Commission and made available to the public.

Commissioner Swanson moved that the minutes be approved.

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

Item #2. Public Comment.

There was no public comment for matters not on the agenda at this time.

Item #3. Proposition 34 Regulations: Adoption of Proposed Regulation 18572 Interpreting Section 85702, Contributions from Lobbyists.

Commission Counsel Scott Tocher explained that staff prepared optional language for the permanent adoption of the regulation. The Commission had previously determined that the lobbyist prohibition applies to personal funds of a lobbyist, and directed staff to explore how far beyond the personal funds of the lobbyist the prohibition should extend. Staff explored applying the prohibition to (1) entities wholly owned by a lobbyist, (2) entities majority owned by a lobbyist, and (3) affiliated entities pursuant to the rules of Government Code Section 85311.

Mr. Tocher commented that subdivision (a) of the proposed regulation had been slightly reworded to make it clearer, but still defined what it means for a lobbyist to make a contribution in terms of the physical act of making the contribution. It also clarifies that the scope of the prohibition in subdivision (a) applies to a lobbyist's personal funds. Mr. Tocher explained that Decision 1, Option A, would provide that the business entity must be wholly owned by the lobbyist. Option B would provide that the business entity must be majority owned by the

lobbyist and the lobbyist would direct and control the contribution. Subdivision a(3) of the regulation addressed the contributions of a lobbyist PAC, when the funds of that committee are comprised solely of the contributions from personal funds of the lobbyist.

Mr. Tocher stated that Options A(1) and A(2) are interpretations of the making of the contribution under § 85702, and include business entities in which the lobbyist has an interest. Option B considers the affiliated entities rules of § 85311.

Chairman Getman stated that the proposed regulation was drafted as though the statute only prohibited the making of a contribution by a lobbyist, and assumes that the acceptance of the contribution by a candidate is treated the same way. An alternate proposal by Thomas Hiltachk defined both "making" and "accepting" a contribution in the same manner. She proposed that the prohibition against accepting a contribution from a lobbyist be treated separately in the regulation, because the language of the statute allowed some latitude to treat the prohibitions differently. She suggested that the first prohibition provide that an elected state official or candidate cannot accept a contribution that is delivered by a lobbyist, regardless of who is making the contribution. She also suggested, as the second part of the prohibition, that a lobbyist cannot make a contribution pursuant to the staff proposal defining a lobbyist's personal funds. Her proposal would create a new subdivision in the regulation, and would treat the two provisions of the statute as having distinct meanings.

In response to a question, Chairman Getman stated that she did not think that Option B addressed her concerns because the decisions proposed are restricted to contributions made from a lobbyist's personal funds. She believed that the statute intended to prohibit a lobbyist from delivering a contribution regardless of whose funds the contribution came from, when ever the lobbyist is registered to lobby that official. She stated that the Proposition 34 ballot pamphlet did not explicitly address this interpretation. The ballot pamphlet stated that it would prohibit all contributions from lobbyists, but also focused on the lobbyist contribution ban in its arguments and analysis.

Chairman Getman opined that the Commission had been dealing primarily with the "making a contribution" language of the statute, thus interpreting it very narrowly. In doing that, the Commission had to focus on the lobbyists' associational and First Amendment rights to make a contribution. Court cases provide some protection for those rights. She did not believe there would be much protection for a lobbyist delivering a contribution from somebody else.

In response to a question, Mr. Tocher stated that he knew of no case law dealing with the role of lobbyists acting as a conduit for campaign contributions.

Chairman Getman stated that there were other cases that found First Amendment or associational rights violations when lobbyists were banned from arranging a contribution, because a lobbyist needs to be able to advise a client. There have been prohibitions on the delivery of a contribution by lobbyists, and the cases have not discussed that part of the ban.

Commissioner Knox stated that if the Commission chose to adopt the sort of interpretation proposed by Chairman Getman, considering the case law described by her, lobbyists would still

be able to direct and control but would not be able to deliver the contribution. He questioned whether that would accomplish anything because the lobbyist could arrange for someone else to deliver the contribution.

Chairman Getman stated that the money connection could not be removed from the lobbyist completely. The lobbyist must be able to talk to the client, and must be able to give funds to people that the lobbyist is not registered to lobby. There are many ways that a lobbyist could get around the ban, but the lobbyist could not hand over a bag full of money to an official the lobbyist is trying to influence. She believed that the statute gave the Commission the leeway to prevent the delivery of the contribution.

Commissioner Downey noted that the job of the Commission was to define the word "make" as it pertains to contributions. That definition could be limited, referring only to personal funds, or it could be expansive, considering the aggregation rules of § 85311. He observed that the Commission wants to enlighten the public through disclosure, and would prefer to lean towards a broad interpretation of § 85702 and the definition of "make." The staff memorandum helped him lean towards Option B because the current version of § 85311 reflects the voter's expectation that the aggregation provisions would apply to monies contributed by lobbyists. Additionally, the Commission is entitled to interpret "make" because it is the Commission's job to do so and § 85311 can be used as a model even if there is not a direct application of § 85311.

Commissioner Downey stated that the Chairman's interpretation of the opening provision of § 85702 creates a statutory interpretation problem because the phrases involved were not equivalent. He noted that the Commission should consider what good the interpretation would do. He presented a hypothetical situation, and noted that the Chairman's proposal would mitigate the impact of a lobbyist handing over campaign contributions.

Chairman Getman noted that the courts refer to the scenario as an appearance of corruption. She stated that it does not look good for a lobbyist to be waving contribution checks in front of an official whose decision-making the lobbyist is trying to influence, because it has the appearance of the lobbyist trying to "buy off" the official.

When asked whether the voters thought that the phrase "contribution from a lobbyist" was distinct from "a contribution made by a lobbyist," Chairman Getman pointed out that if it was meant to mean the same thing it could have said the same thing. She agreed that it could be read either way, but suggested that the Commission had an opportunity to "tighten up" the statute and that they should. She suggested revising the language in Version 2 to read, " a candidate accepts a contribution from a lobbyist, in violation of § 85702, when he or she or his or her agent or controlled committee receives or knowingly receives a contribution mailed, delivered or otherwise transmitted by a lobbyist registered to lobby the candidate's agency," and include it as a new subsection in the regulation. Her proposal would define both "making" and "accepting."

Commissioner Knox stated that he thought the Chairman's proposal is within the ambit of the language of the statute, but was not convinced that it was a good idea. He pointed out that it would make it a little more difficult for the lobbyist to make the contribution, but would not prevent the contribution nor the access the lobbyist would have to the elected official.

Commissioner Swanson favored closing any perceived loophole, but did not believe that the Chairman's proposal would accomplish that.

Chairman Getman responded that there are ways to get around all of the contribution limit laws. However, there is still value in prohibiting the worst cases, and drawing some lines. The voters did that in Proposition 34. She believed that there was something unseemly about the individual who is registered to lobby an official and is directly and blatantly giving contribution money to the official. The people of California have been trying to break that connection since the original version of Proposition 9. She believed that Proposition 34 may have successfully given the Commission a way to do that.

Commissioner Swanson stated that regulation 18572 makes it very clear that the official cannot accept and the lobbyist cannot make a contribution, and questioned what the Chairman's proposal would accomplish.

Chairman Getman responded that staff's proposed regulation would prohibit a contribution if it is from the lobbyist's personal funds. Her proposal would prohibit the candidate from accepting any contribution when a lobbyist who is registered to lobby that person delivers it.

In response to a question, Mr. Tocher stated that subdivision (b) of Decision 1, Option B referred to the broad interpretation proposed by the Chairman.

Chairman Getman stated that she did not agree with that proposed subsection, because it would prohibit contributions made by someone other than the lobbyist when that lobbyist directs and controls the contribution. She believed that the statute did not support that interpretation. She suggested that proposed subsection (b) be eliminated, and that subsection (a)(3) read, "the contribution is made from funds of a committee comprised at least in part of personal funds or resources of lobbyists, and the lobbyist directs and controls the contribution."

In response to a question, Chairman Getman stated that her proposal would not prohibit contributions made by someone other than a lobbyist, but would prohibit the lobbyist from delivering that contribution. She noted that it would provide a difference in the appearance of the contribution, and that it is an appearance that matters. Option B would be too broad because it would provide that any entity that is affiliated in any way with a lobbyist cannot make a contribution, but the statute provides that only the lobbyist cannot make a contribution.

Mr. Tocher noted that the rule would apply to anyone.

General Counsel Luisa Menchaca stated that subdivision (b) provides that the contribution will be attributed to the lobbyist. Since § 85702 is an absolute prohibition, then the whole subsection is tainted.

In response to a question, Mr. Tocher stated that, even though case law allows a lobbyist to "arrange" a contribution, case law has not construed the words, "direct and control." He did not believe that using § 85311 would present a case law problem when a PAC, under the direction

and control of a lobbyist, mails a contribution to an official and is charged with a violation. A court would look at the issue independently.

Chairman Getman noted that the lobbyist must have the right to discuss contributions with a client, according to the original lobbying lawsuit and the Proposition 208 litigation.

Ms. Menchaca noted that staff presented that argument to the Commission, and that the Commission chose a narrower approach to the "making" of a contribution. Staff believed that the broad language of § 85702 allowed Commission broad interpretation options.

Chairman Getman observed that, in the first case, the court stated that it was not saying that severing the tie between lobbyists and contributions cannot be prohibited.

In response to a question, Mr. Tocher suggested that staff would look to the *Kahn* and *Lumsdon* analysis to determine what "direct and control" means under § 85311. He believed that "direct and control" is a level of influence which implies some sort of final authority beyond mere participation.

In response to a question, Ms. Menchaca stated that, if a firm had two or three lobbyists, each with an equal vote on contributions, each of them would "direct and control" the contribution because a formal action of voting would be distinct from making a recommendation to vote on the matter.

Commissioner Downey stated that "direct and control" involved participation in the direction and control of the contribution.

Chairman Getman stated that the lobbyist would have to vote on the contribution in order to be considered directing and controlling the contribution.

In response to a question, Chairman Getman stated that it is probably impermissable to bring in the affiliated entities rule to § 85702, because it would ban someone other than a lobbyist from making a contribution.

Commissioner Swanson moved approval of Decision 1, Option B.

There was no second to the motion.

Commissioner Swanson amended her motion to include the language, "contributions directed, controlled and delivered by a lobbyist."

There was no second to the motion.

Chairman Getman stated that Option B goes too far and would end up in court. She presented and discussed a hypothetical situation, pointing out that it would prevent an organization from making a contribution.

Mr. Tocher stated that the organization would not be prevented from giving, unless it required that the lobbyist participate in the directing and controlling of the contribution.

Chairman Getman questioned whether it was the intent of § 85702 to prohibit an entity from making a contribution when a lobbyist working with that entity participates in the direction and control of contributions.

Mr. Tocher responded that he did not believe that the intent was to bar any organization from giving, but rather to bar lobbyists from making a contribution. The entity can make the contribution, but the contribution cannot be directed and controlled by someone who is prevented from doing so. If a lobbyist serves on a board of an entity, and the entity votes on whether to make a contribution to an official the lobbyist cannot contribute to, then the lobbyist would have to abstain from voting on the contribution.

Technical Assistance Division Chief Carla Wardlow stated that the Commission has not interpreted "directs and controls" to mean someone who sits on a Board of a nonprofit organization. Under reporting rules, two or three individuals who had a vote on whether to make a corporate or business entity contribution would not constitute "direction and control" for reporting purposes. This interpretation was based on the *Kahn* and *Lumsdon* opinions.

Ms. Menchaca stated that § 85311 references regulation 18428, and the issue is what that reference means. Staff would be looking at regulatory changes to clarify the issues.

Thomas Hiltachk, on behalf of the Institute of Governmental Advocates, expressed his concern that the Commission appeared to be using the word "from" to extend the ban to the transmittal of contributions. He pointed out that violations of the prohibitions the Commission was considering would have occurred almost every day since Proposition 34 was passed. This marks the first time extending the prohibition has been discussed, and it would involve a policy change instead of an interpretation of the statute. He believed that the role of the Commission was to interpret the statute, not to provide policy changes. The voters should decide policy changes. Additionally, he stated that the intent of the voters was clear because the language of Proposition 208 prohibited transmittal or delivery of a contribution by a lobbyist, but the language of Proposition 34 did not. Therefore, he believed that the voters intended to eliminate the prohibition. Lastly, he believed that the language of Proposition 34 should have said that the contribution cannot be delivered or transmitted by a lobbyist in order to make the prohibition. Mr. Hiltachk believed that the prohibition should be against a lobbyist making a contribution with personal funds and prohibiting a candidate from receiving the contribution.

Mr. Hiltachk stated that the incorporation of § 85311 is not appropriate. He noted that "direct and control" has a different meaning in the context of campaign reporting.

Chairman Getman argued that the meaning of the phrase has been determined by telephone advice, but the Commission has not had a regulation defining it. She believed that the issue needed to be explored and codified.

Mr. Hiltachk stated that everyone knows what "direct and control" means through the advice and opinions of the Commission. If the Commission incorporates the aggregation statute in a prohibition, it will not work. He noted that the language presupposes the making of a contribution. The whole purpose of the language is to aggregate one person's contribution with another entity's contribution. The first condition-the making of a contribution-never occurs if there is a prohibition.

Trudy Schafer, representing the League of Women Voters of California supported Option B. She agreed with the staff analysis detailing what the voters thought they were voting for. She noted that when a ballot argument mentions a particular provision, it generally means that the provision is given some importance. Since the prohibition of lobbyist contributions to persons they lobby were included in the ballot argument, she believed that an average voter would have expected that the statute be interpreted broadly. She believed that § 85311 should be incorporated into the interpretation. She urged the Commission not to get bogged down in the details of how a Board member would handle a contribution. She noted that, if a lobbyist is directing and controlling a decision, the voter would consider that improper. Option B was the best way to incorporate the interpretation of the voters.

Commissioner Downey stated that the Chairman's concern with proposed subdivision (b) could be remedied with a requirement that the affiliated entity under § 85311 also include personal funds of the lobbyist in the contribution. He stated that the voters considered the words "from" and "made" as meaning the same thing. He agreed that the appearance of impropriety was a concern. For expediency purposes, Commissioner Downey suggested that the Commission not adopt the Chairman's proposal respecting the definition of a contribution "from" a lobbyist as something different from the contribution "made" by the lobbyist.

Commissioner Knox agreed.

Commissioner Swanson agreed, and suggested that the wording be changed to read, "contributions directed or controlled or made by a lobbyist will be attributed…"

Commissioner Downey stated that the language should include assets or personal funds of the lobbyist.

Commissioner Knox suggested that Option A2 could be adapted to work. He believed that the reference to contributions made by a business entity which is majority owned by the lobbyist would implicitly include the requirement of personal funds.

Mr. Tocher suggested that the wording of subdivision 2 could be changed from, "wholly owned or majority owned" to, "owned at least in part by the lobbyist and the lobbyist directs and controls the making of the contributions."

Commissioner Knox agreed, noting that it would eliminate the concern that a sole practitioner lobbyist would be subject to having their firm's contributions banned, but a partnership practice with less than a 50% ownership interest would not be subject to the ban.

Mr. Tocher suggested that the defining of the acceptance of a contribution could be considered as a separate regulation that staff could bring back to the Commission. He noted that § 84309 contains a prohibition that, arguably, is simple to get around but gives voice to the notion of the appearance of corruption. If "accept" is defined in a way that makes it easy for the lobbyist to send someone else to deliver the contribution, it would still disconnect the lobbyist from the actual handling of funds, which appears to be a troubling matter that the voters have tried to address.

Chairman Getman argued that the Commission had the opportunity to say that it is not appropriate for contribution monies to be exchanging hands in a manner that appears as if the lobbyist is trying to influence an official's decision with money, and that the voters have been trying to say just that for 25 years. Even if it is only symbolic, if it gives the appearance of corruption then the Commission should stop it. She believed that people would be shocked to learn that the law does not prohibit those types of contributions.

In response to a question, Chairman Getman stated that this would not be the first time that the Commission has changed its reading of a statute. She noted that it may not even be a change in the reading of a statute. Whenever a new initiative is passed, there are often provisions that are not interpreted right away and people act at their peril. The Legislation was not applicable to statewide officials when Proposition 34 was passed, but the legislature passed SB 34 to make the provisions applicable now, strengthening the measure. She questioned whether the voters really thought that a lobbyist would only be prohibited from contributing personal funds. Chairman Getman cautioned the Commission not to miss the forest for the trees.

Mr. Tocher suggested that the bracketed language of proposed subsection (2) be changed to read, "owned at least in part by the lobbyist, and the lobbyist directs and controls the making of the contribution."

In response to a question, Ms. Menchaca explained that "directs and controls" would have the construction included in the *Lumsdon* and *Kahn* opinions, because the Commission decided that at a previous meeting. The terms "direct and control" appear in the statute for the first time in § 85311. When questions have arisen regarding § 85702 and affiliation, staff has cautioned that "directs and controls" under § 85311 had yet to be interpreted by the Commission. When staff deals with the reporting regulation that deals with affiliated entities, they may present language for the Commission's consideration with regard to threshold amounts. Staff needed to do further study to determine whether to advise the Commission to continue with the same reporting rules in the contribution limit context. Ms. Menchaca noted that the regulated community would prefer that the same rules be used when reporting contribution limits.

In response to a question, Ms. Wardlow stated that neither lobbyist would be considered to be directing and controlling a contribution when it is made from a lobbying firm with two lobbyists and neither lobbyist is a majority owner of the firm.

Commissioner Knox commented that it would cause a silly result. He explained that if the firm made a contribution, it would be aggregated with the individual's contribution only if the individual were a registered lobbyist and a part-owner of the firm, and directed and controlled

the contribution. This would mean that the lobbyist would have to have at least 51% interest in the firm.

Chairman Getman agreed that this would be correct under the reporting rules.

Ms. Menchaca noted that the same issue arose with Proposition 208. The issues were not as critical when they involved the reporting rules. However, a potential violation of the contribution limits makes the issue more complicated and a bigger concern.

In response to a question, Ms. Wardlow stated that there are huge law firms where 800 partners are in the firm, but only six lobbyists. If the firm is a lobbying firm under the Act, the proposed language, "and the lobbyist directs and controls," is necessary to avoid an unfair result.

Mr. Tocher noted that it was sort of an extension of the accommodation made for spouses, whereby one spouse decides to make a contribution and that contribution would not be prevented even though the lobbyist spouse shares the funds. He explained that "direct and control" involves the affirmative act of making. If a person did not participate in the decision to make a contribution, the proposal would not require that the contribution be attributed to the person even though some of the funds came from that person.

Commissioner Knox suggested that the language "directs and controls" be changed to "participates in the decision to make a contribution." The lobbyist could simply abstain from the decision to make the contribution and the firm could still make the contribution.

Mr. Tocher had no objection to that suggestion.

Kathy Donovan, from Pillsbury Winthrop, explained that her firm is a lobbying firm with five partners registered to lobby. She was concerned that the language proposed by Commissioner Knox could bring in the court decision concerning the lobbyists right to give advice about the making of contributions.

Chairman Getman noted that the decision applied to advice given to a client. She believed that advising the lobbyist's own firm was a totally different issue. She believed that the statute intended to prevent the lobbyist from making a contribution from the lobbyist's firm.

Ms. Donovan stated that the lobbyist would be making a recommendation, but not voting on the decision, because the firm has a committee that makes the decision. She provided the example of a lobbyist who, on behalf of a client, requests that the committee consider making a contribution to a client.

Chairman Getman responded that the lobbyist would be participating in the decision.

Commissioner Knox pointed out that the example provided by Ms. Donovan constituted just the kind of loophole that the Commission was trying to close.

Chairman Getman stated that the lobbyist can advise the client how to spend the client's money, but cannot participate in the decision to contribute monies from his own firm.

Ms. Donovan stated that she believed that the lobbyist had a First Amendment right to make recommendations extending beyond the narrow situation the Commission was considering.

Commissioner Knox stated that if there was a First Amendment right to make recommendations to the lobbyist's own firm, then that right would be extended to making contributions from the lobbyist's personal resources, which is banned by § 85702.

Chairman Getman noted that a federal district court had already upheld the issue.

Ms. Donovan opined that, "directs and controls" would be clearer.

Mr. Hiltachk stated that the issue may not be a very big problem. There are about 1,000 registered lobbyists, and about 200-300 lobbying firms registered in the state. Of those, he questioned how many had only two partners. If there are more than two partners, then each partner would not direct and control because they would not own enough of the business to control the decisions. He believed that the Commission was grasping for a solution to a problem that does not exist. A sole practitioner would not be able to contribute, but he did not believe that there was any way to get around that even though it did not seem fair.

Chairman Getman noted that § 85311 had no bearing on the lobbyist statute, and pointed out that Mr. Hiltachk had agreed that it had no bearing on the lobbyist statute.

Mr. Hiltachk suggested that the language should come from the *Lumsdon* opinion.

Commissioner Knox pointed out that using the "participation" language would eliminate the inequity between the way sole practitioners and partners in lobbying firms are treated.

Mr. Hiltachk stated that it would eliminate the First Amendment rights of the other partners of the firm.

Chairman Getman argued that their First Amendment rights were still protected. The proposed regulation would only prohibit the lobbyist from participating in contribution decisions.

Commissioner Knox pointed out that the lobbyist's First Amendment right may have been eliminated, but the plain language of § 85702 does that.

Mr. Hiltachk noted that the court had problems with imputing communications and advice by a lobbyist as being something that could be prohibited. The design of the proposed regulation would prohibit the action of making a contribution. It does not discuss talking to a client, friends, a volunteer PAC, or an employer. He did not believe that the Commission could require that communicating with any of those entities would cause the lobbyist to violate another ban.

In response to a question, Mr. Tocher recommended that subdivision (3) of the proposed regulation be changed to read, "the contribution is made from funds of a committee comprised in part of contributions from personal funds or resources from lobbyists." Subdivision (b) would be eliminated entirely.

Mr. Hiltachk stated that Mr. Tocher's proposal would eliminate the state Republican and Democratic parties, who receive contributions from lobbyists. The whole notion of "solely comprised," which would be eliminated under Mr. Tocher's proposal, was intended to prevent lobbyists from getting around the contribution prohibition by forming a PAC. He proposed the language to prevent that circumstance from happening. He believed that lobbyists contribute to a lot of organizations as an exercise of their First Amendment right and not to influence anybody. He did not believe that his political party should be shut out just because he writes a $35 check to his political party.

Commissioner Knox stated that the political parties would be able to contribute providing the lobbyist does not participate in the decision to make the contributions. He agreed with Mr. Hiltachk that it would eliminate the lobbyist's ability to participate in his local county central committee.

Chairman Getman noted that the only other option would be that the lobbyist could participate if none of the lobbyist's funds were included in the contribution.

Mr. Tocher noted that modifying the language "solely of" would eliminate the potential for "gaming," whereby an entity could receive a $1 contribution from a non-lobbyist that would remove the firm from the prohibition. He discussed possible alternate language.

Commissioner Knox stated that § 85702 prohibits the lobbyist from making contributions to a candidate from his or her personal funds. He questioned whether the Commission should be concerned about protecting the lobbyist's behavior when the lobbyist is elected to a county central committee, makes a contribution to a county political fund, and then votes regarding the allocation of the fund. He believed that "laundering" might be too strong for the violation potential, but noted that there was something inconsistent with the prohibitions of § 85702.

Mr. Hiltachk called it democracy. He questioned why a lobbyist who happens to work for a corporation as a government relations director and spends 34% of his time talking to public officials, loses his or her First Amendment protection.

Chairman Getman stated that § 85702 did that.

Commissioner Knox agreed that the voters did that by passing § 85702.

Mr. Hiltachk argued that § 85702 did it with respect to the lobbyist's personal contributions.

Chairman Getman responded that it would prevent the lobbyist from pouring money into a club and then deciding that money should be spent to influence the very official that the lobbyist lobbies. She saw no problem with that. She noted that it was exactly what § 85702 does.

Mr. Hiltachk noted that his $35 contribution to a political party was just a small amount, compared to the unlimited amount of money the political party can contribute, and should not prohibit the party or the lobbyist from participating. When the ban extends too far and interferes with an individual's rights under the First Amendment, it becomes unconstitutional.

Commissioner Knox noted that § 85702 does that. The scenario presented by Mr. Hiltachk would be prohibited if the Commission were to adopt a construction of § 85702 in which the words "directly or indirectly" were inserted in connection with the prohibition on the lobbyist making a contribution.

Mr. Hiltachk responded that those words were not put in the statute and that the Commission cannot insert them. He believed that only the word "directly" was implied, and was the word that was used in the Proposition 208 regulations adopted by the voters.

Chairman Getman noted that Proposition 208 was gone, that this was a completely different initiative, and that there was nothing that required the Commission to consider the history of Proposition 208 as somehow connected to the history of Proposition 34. She pointed out that the courts have already said that the ban is constitutional. If it is not appropriate for the lobbyists to give directly to the candidate, there is no provision that would make it permissible for the lobbyist to give to a PAC and then make sure that the PAC sends a contribution to that same candidate.

Mr. Hiltachk pointed out that there was a laundering statute.

Chairman Getman responded that it would not constitute laundering.

Mr. Hiltachk argued that if he contributed to a PAC and had the ability to control where that PAC sent the contribution, and the contribution was given to an elected official that the lobbyist is registered to lobby, then it would be laundering. That is prohibited and does not need to be incorporated in the regulation.

Chairman Getman moved that regulation 18572 be adopted on a permanent basis with the following changes:

- Lines 14 through 16 would read, "The contribution is made by a business entity, including a lobbying firm owned in part by the lobbyist, and the lobbyist participates in the decision to make such contribution."
- Lines 17 through 18 would read, "The contribution is made from funds of a committee comprised in part of personal funds or resources of the lobbyist and the lobbyist participates in the decision to make such contribution."
- Lines 2 and 3 on page 2 would be deleted.

Chairman Getman noted that she would not vote for her motion.

Commissioner Knox seconded the motion.

Commissioner Knox voted "aye." Chairman Getman, Commissioners Downey and Swanson voted "no." The motion failed by a vote of 1-3.

Chairman Getman stated that she supported the motion as to the "making" of a contribution, but it should have additionally banned the delivery of a contribution from a lobbyist. She noted that her proposed motion could be adopted to define "making a contribution," and that a separate regulation could address, "accepting a contribution."

Commissioner Downey stated that he would like to see the language in writing before voting again.

Commissioner Swanson stated that she wanted Option B reflected in the language. She thought it provided the least convoluted resolution.

After further discussion, it was decided that Mr. Tocher would work on the language and bring the regulation back to the Commission later in the day.

Item #4. Adoption of Amendments to Lobbying Disclosure Regulations 18239—Definition of Lobbyist; 18615—Accounting by Lobbyist Employers and Persons Spending $5,000 or More to Influence Legislative or Administrative Action; and 18616—Reporting by Lobbyist Employers and Persons Spending $5,000 or More to Influence Legislative or Administrative Action.

Ms. Wardlow stated that the proposed amendments pertained to reporting payments in connection with lobbying the Public Utilities Commission. She noted that changes needed to be made because of legislative changes to the Act. Most of the proposed changes were technical.

Ms. Wardlow explained that Regulation 18616(g)(5) changes have raised some questions, and she distributed copies of alternative language for that section. The new proposed language would delete the reference to subdivision (f)(1) on the second line of subsection 5, and go back to referring only to subdivision (f). It would also add a new subsection 5(D). The purpose of the new language is to clarify that the reduced reporting exception does not apply when a lobbyist employer is paying a lobbyist to lobby the PUC. This is not a change, but would make the current rule clearer.

Chairman Getman moved permanent adoption of regulations 18239 with no changes, 18615 with no changes, and 18616 with the changes indicated in the alternative language distributed by staff.

Commissioner Downey seconded the motion.

Chairman Getman, Commissioners Downey, Knox and Swanson voted "aye." The motion carried by a vote of 4-0.

Item #7. In the Matter of Manson F. Wong, FPPC No. 97/655.

Chairman Getman announced that Mr. Wong sent a letter to the Commission earlier in the morning, in lieu of making an appearance. The letter was a brief that was filed after the deadlines and was received too late to be considered by the Commission. She stated that none of the Commissioners had been given a copy of the letter, but that it would be included as part of the record. The Commissioners would not consider the letter as part of their deliberations.

Staff Counsel Melodee Mathay explained that the case involved eight counts of laundering contributions to the San Francisco Mayor's race in October 1995. She explained the nature of the contributions as outlined in the staff memo. Ms. Mathay discussed the efforts of current and former staff in developing and presenting the case, and the contributions of the San Francisco District Attorney's (SFDA) office.

Chairman Getman noted the huge impact on staff resources caused by one administrative hearing.

Ms. Mathay explained that the SFDA brought a criminal action against Mr. Wong, and that Mr. Wong was placed in a pre-trial diversion program. Through the program, Mr. Wong performed 25 hours of community service and the record of the criminal action was purged. Judge Anderson found that Manson Wong committed eight violations of the PRA concerning laundering campaign contributions and imposed the maximum fine. She found that the violations were serious, that they deliberately circumvented state and local laws, and that Mr. Wong did not cooperate with the investigation in a genuine manner. There were no meaningful mitigating circumstances.

Ms. Mathay recommended adoption of the proposed decision.

In response to a question, Ms. Mathay stated that the respondent admitted that he had used his own money to purchase the checks. He stated that people reimbursed him both in cash and through reductions in debts that he owed. However, those reimbursements occurred after investigators initiated their investigation. If the persons interviewed had told investigators that they repaid Mr. Wong when first interviewed, there would have been no case. However, those persons initially told investigators that they did not make contributions, they did not know about contributions, and that they did not reimburse Mr. Wong. After the investigators spoke with them, Mr. Wong approached them. At that point, some of those eight persons (which included family members, close friends and business associates) changed their testimony. She stated that all but one of those persons testified at the hearing.

Chairman Getman suggested that the word "Respondent" be changed to "Mr. Yeung" on page 4, paragraph G, line 2.

Ms. Mathay agreed that it should be changed.

In response to a question, Ms. Mathay stated that the affidavit of Annie Wong was introduced as evidence. It indicated that Ms. Wong did not reimburse Mr. Wong in cash, but that she agreed to

reduce a debt that Mr. Wong owed Ms. Wong. When investigators first contacted her, she stated that she did not make a contribution and did not have $500 to make a contribution. Mr. Wong contacted her after the investigators had spoken to her, and, at his direction, she signed an affidavit prepared by Mr. Wong. She admitted during the hearing that the money she was supposedly owed was for child support that she did not think she would ever be paid.

In response to a question, Ms. Mathay stated that Mr. Wong admitted that he was aware of the $500 contribution limit in San Francisco.

In response to a question, Ms. Mathay explained that the SFDA filed a criminal complaint for misdemeanor violations of the Act, charging that Mr. Wong made contributions through other people. He was represented by a criminal defense attorney at the pre-trial conference, where the case was sent to the pre-trial diversion program.

Enforcement Chief Steve Russo explained that once persons who are allowed to go into the program comply with the order of the court, which in this case was community service, the court and the court dismisses the underlying complaint. There is no conviction, and a rap sheet would show an arrest and diversion, but no disposition that would be usable against that person. The person could say that they were never convicted of an offense.

Item #8. In the Matter of Signature Properties, Inc., FPPC No. 01/386.

Mr. Russo asked the Commission to continue this case for one month. He explained that staff is in the process of reaching a stipulated settlement in the case. They had noticed a default decision and the respondent contacted staff and indicated a willingness to enter into a stipulated resolution of the case. Staff received the signed stipulation, but had not yet received the fine money. They expected to have it by the June Commission meeting.

In response to a question, Mr. Russo stated that the fine amount for the stipulation would be $10,000, which was consistent with a prior offer communicated to the respondent. Staff asked for more in the default because they would have to undergo an action to collect the money.

In response to a question, Mr. Meinrath stated that the original stipulated offer was made in October 2001. Respondent did not reply until 4:00 p.m. May 7, 2002.

Chairman Getman stated that she did not see any reason why the Commission should not go ahead with the default decision.

In response to a question, Mr. Meinrath stated that the counsel for the respondent stated that he knew about the default decision, having learned about if from a colleague. Mr. Meinrath stated that the default decision had not been served on the respondent because it is not a requirement under the code. Respondent's attorney had been personally served with the accusation. The attorney, Mark Stice, stated that he did not have the accusation in his file, but said it was possible that he had been served.

Commissioner Downey stated that he was sympathetic with the Chairman's concern, but supported Enforcement staff's recommendation.

Mr. Meinrath stated that the difference between the fine in the default decision and the offer staff made, pertained to count four. Enforcement staff has had a policy that electronic reporting, in its first year of implementation, was considered a mitigated offense because the reporting community had little experience with it. Therefore, the offer staff made included the maximum penalty for the first three counts, and a $1,000 penalty for the fourth count. In the default decision, staff imposed the maximum amount for the electronic reporting violation because the respondent had not responded at all.

Mr. Meinrath stated that he could not say whether the money for the fine would arrive. He noted that receipt of a cashier's check is better than an order which would have to be enforced. If the Commission tells the respondent that he will be charged the maximum, the respondent may want to litigate the case. He noted that the respondent would admit their wrongdoing in a stipulated case, but would not in a default decision. Mr. Meinrath explained the process of litigating a case.

Chairman Getman stated that, if the Commission is concerned about how much money it brings in, then the argument made sense. However, the Commission's concerns are far broader. In particular, she was concerned that a wrong message would be sent if the Commission allowed the lawyer to come in at the last minute, without yet paying the fine, to get a stipulated settlement.

Mr. Meinrath agreed that it is not about the money, but that it is important to get the respondents to admit their liability.

Chairman Getman stated that the default decision shows that the respondent was liable. She stated that there are other reasons why the respondent would not want the default decision to be accepted.

Commissioner Downey agreed with the Chairman.

In response to a question, Mr. Russo stated that, if the case was resolved by stipulation, the matter would be ended. He noted that the Commission could wait until June to consider the matter, and at that point consider it as a default decision or a stipulation. The Commission is not required to grant relief from the default decision when the grounds for granting relief are due to neglect because the parties failed to file the notice of defense within the timelines prescribed.

In response to a question, Mr. Meinrath stated that the respondent undoubtedly expects that the default will be taken off the calendar and that the stipulation would be submitted in June. He stated that he would be more comfortable if the respondent had an opportunity to appear at a hearing.

Chairman Getman did not agree that the respondent should be given that opportunity now.

Mr. Russo stated that, under the APA, the respondent has the opportunity to ask the Commission not to grant the default at the time that it makes that order. The respondent also has a period of seven days after the default is granted to request relief from the default. Should he do so, the matter would be on the agenda for June 2002.

Chairman Getman moved that the Commission enter the default.

Commissioner Knox seconded the motion.

Chairman Getman, Commissioners Downey, Knox and Swanson voted "aye." The motion carried by a vote of 4-0.

Items #9, #10, #11, #12a, #12b, #12c, and #12d.

Commissioner Swanson moved that the following items be approved on the consent calendar:

Item #9. In the Matter of The Merit Shop Roundtable, FPPC No. 01/717. (1 count.)

Item #10. In the Matter of Suzanne Cunningham, FPPC No. 01/767. (1 count.)

Item #11. In the Matter of Victor MacFarlane, FPPC No. 01/747. (1 count.)

Item #12. Failure to Timely File Late Contribution Reports - Proactive Program.

a. **In the Matter of Robert Mondavi Winery Corporation, FPPC No. 2002-13.** (4 counts.)
b. **In the Matter of LA County Council on Political Education, FPPC No. 2002-17.** (1 count.)
c. **In the Matter of AECOM, FPPC No. 2002-33.** (1 count.)
d. **In the Matter of Committee to Elect Marco Firebaugh, FPPC No. 2002-93.** (1 count.)

Commissioner Knox seconded the motion.

There being no objection, the items were considered on consent.

Item #13. Legislative Report

Executive Fellow Scott Burritt presented three bills for discussion.

AB 1791 (Runner)

Mr. Burritt explained that the bill would reduce the number of days in which § 87200 filers and designated employees must file their SEI from 30 days to 10 days. He noted that Assemblyman Runner has said that it would be applicable only to state employees, but, as drafted it would be applicable to local filers as well. Staff would work with his office to see if it will be amended.

Mr. Burritt stated that staff believed 10 days is not enough time to complete and file the forms. Frequently, filers have to consult financial records, advisors, and spouses with separate financial interests. Mr. Burritt noted that local ethics agencies, including Los Angeles and San Francisco, believe that 10 days is not enough. Mr. Burritt recommended opposing the bill.

In response to a question, Mr. Krausse explained that this bill was originated by the Secretary of State as a 10-point plan on ethics and that it has been narrowed down to just the one point.

Chairman Getman noted that the main problem with opposing the bill is that it appears as if it tightens up the law. During the hearings, an assembly member noted that the FPPC opposed the bill because there was not enough time to file the statements, especially at the local level. Assemblyman Runner responded that it only applied to state employees and the bill passed. However the language indicated that it would apply to both state and local employees and still reads that way.

Mr. Krausse noted that staff has had difficulty with a number of bills that look, on their face, like a good idea. He did not believe that the floor discussions were in-depth enough to explore the issues.

There was no objection from the Commission to remaining opposed to the bill.

Chairman Getman stated that staff would try to ensure that the members of the Senate have the FPPC position in front of them. She noted that each member of the Assembly did have a letter from the FPPC with the reasons for the FPPC's opposition outlined.

AB 1797 (Harman)

Mr. Burritt explained that this bill would direct the actions that a public official must take when it is determined that a conflict or a potential conflict of interest exists. The bill is on the Assembly floor. Mr. Burritt reminded the Commission that Assemblyman Harman appeared at the March 10, 2002 FPPC meeting to request the Commission's sponsorship of the bill. Staff had since worked with Assemblyman Harman's office. The California League of Cities supports the bill.

Mr. Burritt stated that many of the provisions that were of concern to the Commission still exist in the bill. Among those, the bill would require public disclosure of financial interests, even for decisions made during the normal course of business, outside a public setting. Provisions requiring public officials to leave the room remain in the bill. Staff believed that public officials should be able to testify as a member of the public, and without that provision the bill may be unconstitutional.

Mr. Burritt noted that even if the concerns were addressed, staff still had a concern over whether enforcement resources would be better spent enforcing the more serious offenses under the PRA rather than the manner of disqualification.

Because of the enforcement concerns, Mr. Burritt recommended an oppose position on the bill.

In response to a question, Mr. Burritt explained that the bill has not yet been amended by Assemblyman Harman to allow the public official to testify as a member of the public.

Executive Director Mark Krausse explained that the League of California Cities may support the bill because it looks good on its face. He observed that the Commission could approach it by suggesting that the requirement be a recommendation. The provision would not then have to be enforced.

Chairman Getman noted that the Commission has tried to remove provisions in the law that are unenforceable.

Mr. Burritt stated that a local water board opposed the bill because they want to remain in the room and testify as members of the public.

Commissioner Swanson stated that she was opposed to the bill, but was concerned that an oppose position would appear as if the Commission was willing to facilitate a situation that would allow an official to participate and/or intimidate colleagues with their presence. She did not believe that sort of scenario would happen.

Chairman Getman noted that both Mr. Krausse and Mr. Burritt have been making that point at the Legislature. She stated that it would be a waste of FPPC resources to have to make sure that someone recuses himself or herself when they may not even have a conflict. That was the reason the FPPC voted to change the law.

There was no objection from the Commission to opposing the bill

Commissioner Swanson inquired as to ways to make the FPPC position stronger.

AB 3022

Mr. Burritt explained that this bill would require that all designated employees take an ethics training course every two years. Agencies would have to develop new ethics training courses to address the limited disclosure that many employees have.

Mr. Krausse stated that it would require substantial FPPC resources, and suggested that the FPPC support the bill if it is amended to include funding for new positions. He anticipated that it would most likely increase the number of advice calls staff receives.

Chairman Getman noted that the resources to make the initial training were substantial. It was time well spent, but the training materials would have to be changed quite a bit for this legislation. She urged the Commission to accept staff's recommendation.

In response to a question, Mr. Krausse stated that he believed that a request for two additional employees could be justified.

There was no objection from the Commission to supporting the bill with staff's proposed amendment.

SB 2095

Mr. Krausse explained that the bill requires that the Secretary of State's website have a single place to link to for all independent expenditures. Staff recommended a position of support if amended to accommodate concerns that the candidates can be linked to the independent expenditures.

David Hulse, from the Secretary of State's office, stated that their Political Reform Division is addressing the issue and attempting to create the information on their web site, regardless of whether the bill passes.

Mr. Krausse stated that the SOS lobbyist has not opposed the bill, and opined that they are probably neutral or in support of the bill.

Chairman Getman stated that this was one of the major concerns expressed by media representatives at the FPPC's recent training on electronic disclosure. They would like to be able to click on a button to get a list of all independent expenditures for a particular candidate. Mr. Krausse stated that the bill passed out of the Senate and will go to the Appropriations Committee next.

There was no objection from the Commission to supporting the bill with amendments.

In response to a question, Mr. Krausse stated that AB 690 (Wesson) and SB 3 (Brulte) address last year's LA mayoral election wherein telephone banking maligned candidates. Both of the bills were stalled, and he did not know of any plan to move them forward. The bills each had a number of drafting problems.

Mr. Krausse noted that AB 3051 (Papan) would modify the definition of broadcast advertisement to include telephonic messages, requiring some of the same disclosures that are currently required for broadcast advertising in a telephone advertisement. He suggested that this bill would be more likely to move, and stated that he would keep the Commission informed of its status.

Commissioner Swanson requested that Mr. Krausse keep the Commission informed so that they can take action should they decide to.

Chairman Getman noted that the Commission had taken an oppose position on SB 3 because it was unenforceable as written. She discussed the provisions and specific problems with the bill.

Mr. Krausse explained that AB 690 is in the Appropriations Committee in the Senate but has not had any activity of late. He noted that a telephone conversation disclosure provision would be difficult to enforce unless the receiving person recorded the message on their voice mail machines.

Item #14. Executive Director's Report

Mr. Krausse introduced Bill Lenkeit, and Liz Conti, new Enforcement Division attorneys.

Mr. Russo stated that another new Enforcement Division attorney would start work on June 3.

Senior Commission Counsel Larry Woodlock reported that a new Legal Division attorney would begin work on May 13.

Item #15. Litigation Report

Chairman Getman announced that the Litigation Report would be taken under submission.

The Commission adjourned for a break at 3:41 p.m.

The Commission reconvened at 4:07 p.m.

Item #3. (Continued)

Mr. Tocher distributed revised language for proposed regulation 18572 to the Commission and made it available to the public. He explained that subdivision a(1) remained the same but that a(2) incorporated the two changes requested by the Commission. Subdivision (b) tries to distill the previous language indicated in strikeout. He suggested that it be introduced with the clause, "For purposes of § 85702," and that the wording should read, "A lobbyist may not direct and control contributions of an entity, as defined in Government Code section 85311, subdivision (a)(1)." He was not sure if this would make a substantive change to the previous language, but thought it was clearer.

In response to a question, Mr. Tocher stated that subdivisions a(1), a(2), and a(3) are connected by the lobbyist's ownership of funds. Subdivision (b) refers to any entity whose contributions are directed and controlled, and does not require two steps as required in a(2) and a(3). He did not believe that subdivision (b) would impinge on a lobbyist's right to advise a client with respect to where to contribute money, because "direct and control" is different from "advise."

In response to a question, Chairman Getman stated that "direct and control," with respect to subdivision (b), would allow a lobbyist to advise a client because the client would be making the decision.

In response to a question, Mr. Tocher stated that the word "may" in subdivision (b) means "shall," and stated that he would change the word to shall if the Commission wished to do so.

Chairman Getman observed that, under subdivision (b), a lobbyist who is directing and controlling contributions of an entity is making a contribution, and that it would not be true in any other context.

Commissioner Downey questioned whether subdivision (b) is that important.

Commissioner Swanson stated that Mr. Tocher was addressing subdivision (b) at her request.

Commissioner Downey stated that he was satisfied with the provisions of subdivision a(1), a(2) and a(3), and noted that subdivision (b) could open up problems because of the language, "direct and control."

Mr. Hiltachk expressed his concern over the notion of "participates" in subdivision a(2) and a(3). He presented a hypothetical scenario, in which an executive director of a realtor's association who lobbies for that organization contributes $50 to a realtor's PAC. The realtor would be prohibited from doing his or her job of helping the PAC board make contribution decisions because he was participating, which he believed means "advise." This would not be in accordance the original *IGA* case wherein the court decided that lobbyists have a constitutional right to advise their clients. He noted that the lobbyist could refrain from contributing to the trade association PAC. However, he believed that a lobbyist should be allowed to join an organization for ideological purposes, make contributions to that organization, and participate in the contribution decision-making process.

Chairman Getman pointed out that a lobbyist could participate as Mr. Hiltachk described if the lobbyist was not registered to lobby the recipient of the contribution.

Mr. Hiltachk responded that lobbyists are registered to lobby entities, not people. If he were a member of the Sierra Club, and contributed to the Sierra Club, he would not be able to participate in the decision to contribute to a member of the Assembly if he were registered to lobby the assembly.

In response to a comment, Mr. Hiltachk pointed out that if he contributed $35 to a political party with a ten million dollar budget, he would not be able to participate. If the "directs and controls" language were used, there would be a connection establishing that the lobbyist had a special influence over the contribution decision making, and that the lobbyist would have power within the organization amounting to more than one vote out of twenty-five in contribution decisions. He questioned whether a lobbyist "participates," when the organization does not follow the lobbyist's advice.

Commissioner Knox observed that, if the Commission uses the "direct and control" language, a 2-person lobbying firm has no one person directing and controlling because neither has a majority interest in the firm.

Mr. Hiltachk responded that there are few 2-person law firms, and he did not believe that a lobbyist should lose his or her rights because of a handful of 2-person lobbying firms.

Chairman Getman observed that it would involve much more than a handful of firms and presented an example. She noted that if "participating" goes too far on one side, then "direct and control" goes too far on the other side.

Commissioner Knox agreed that "participating" was not the best word, and suggested that another word that would make clear that the lobbyist casts a vote on the contribution would be preferable.

Commissioner Downey expressed his concern about the protected activity in Mr. Hiltachk's example.

Mr. Tocher responded that, in Mr. Hiltachk's realtor scenario, the funds of the contribution belong solely to the client. The regulation deals with funds that are comprised, at least in part ownership, by the lobbyist.

Mr. Hiltachk noted that, once he gives his contribution to the PAC, he has given up ownership.

Chairman Getman suggested that the regulation include a subdivision 4, with language stating, "Nothing in this regulation is intended to prohibit a lobbyist from advising a client as to where to make contributions."

Commissioner Knox stated that it would address his concerns.

In response to a question, Commissioner Knox stated that an executive director lobbyist could differentiate between advising and participating by advising a committee about how to vote on a campaign contribution but not voting on the decision.

Commissioner Downey noted that it would be better if the executive director lobbyist did not participate at all.

Commissioner Swanson suggested that subdivision a(2) be amended to read, "The contribution is made by a business entity, including a lobbying firm owned in part by a lobbyist." striking the rest of the language in that sentence.

Commissioner Knox observed that the additional language was intended to address the concern that the lobbyists may comprise a very small percentage of the firm's ownership. The contributions of the law firm should not be consolidated with the lobbyist's contributions if in fact the lobbyist does not take part in deciding to whom the contribution will be made.

Ms. Menchaca stated that it would be difficult for staff to differentiate between advising and participating, and it would be helpful to staff if a distinction were drawn. She suggested that a new subdivision a(4) could be included with language reading, "For purposes of subdivision a(2) and (3), merely advising a business entity, committee or a client regarding a decision to make a contribution does not constitute participation."

Commissioner Knox agreed, but suggested that it be included as a new subdivision (b).

Commissioner Downey suggested that the word "merely" be deleted.

Chairman Getman stated that "merely" should be included, but questioned whether the suggestion may go too far. Case law protects a lobbyist advising a client. She did not think that it was necessary to protect a lobbyist advising a wholly unrelated business entity.

Mr. Hiltachk stated that there is no government interest in prohibiting a lobbyist from advising a non-client because they are not employed by that client.

Chairman Getman responded that if a lobbyist is advising a non-client in which the lobbyist has a financial interest, it would nullify the provisions just discussed.

Mr. Hiltachk stated that it would be far removed from the government interest to prevent the appearance of corruption. If a member of a Pro-Choice club lobbied for a business entity, there would be no government interest to prohibit the lobbyist from participating in the club.

Chairman Getman disagreed. Under Ms. Menchaca's proposal, the contribution could be made by a lobbying firm that a lobbyist owns in part, and the lobbyist could advise the firm as to how to make the contribution, but the lobbyist could not participate in the voting for or against the contribution. Chairman Getman did not believe that the case law required the Commission to make a distinction that fine.

In response to a question, Chairman Getman agreed that the lobbyist may enjoy the right to advise a client. However, that the right did not necessarily include advising business partners on how to spend money that belonged partially to the lobbyists when the lobbyist was not permitted to send the money directly.

Commissioner Knox agreed.

Ms. Menchaca suggested that the wording be amended to, "merely advising a client regarding a decision to make a contribution would not be prohibited by this regulation."

Commissioner Knox questioned why any exculpatory language should be needed at all.

Chairman Getman responded that, if "participation" is taken too literally, it could be construed to prohibit a lobbyist from advising a client.

In response to a question, Chairman Getman stated that there are grounds for prohibiting a lobbyist from advising a PAC on how to contribute if the lobbyist has made any contributions. However, she cautioned that the courts have said that the lobbyist has the right to advise a client.

Mr. Tocher suggested the language read, "Nothing in this regulation shall be construed to prohibit a lobbyist from advising his or her client regarding the making of a contribution."

Mr. Hiltachk asked how ownership of shares would affect the lobbyist.

Chairman Getman stated that a hundred different scenarios could come up, but that the Commission's concern was protecting the lobbyist's right to advise a client, and the proposed language should provide that protection.

Mr. Hiltachk stated that most lobbyists are registered because they work for a company. He surmised that many owned stock in the company.

Chairman Getman stated that the contribution did not come out of the lobbyist's stock.

Commissioner Downey noted that the contribution would come from a business in which the lobbyist had an ownership interest.

Ms. Menchaca noted that advising the client would be permissible under the proposal, and that staff would have to struggle with the interpretation of "participation." However, she did not know how to draw a finer line.

In response to a question, Commissioner Downey stated that some of the language of a(2) and a(3) is not redundant because one has to do with a business and one has to do with a committee.

Mr. Tocher suggested that the language of subdivision (b) read, "Nothing in this regulation shall be construed to prohibit a lobbyist from advising his or her client or lobbyist employer regarding the making of a contribution."

Ms. Donovan stated that Mr. Tocher's suggestion dealt with the concern she had about in-house employee lobbyists. She was still concerned about situations wherein any kind of lobbyist owns stock in a publicly traded company that is part of a trade association or chamber of commerce. The term "advising" could interfere with their ability to talk to others about another company's plan to make a contribution.

Chairman Getman responded that it would never prevent them from talking to that other company. It would prevent them from making a decision. She noted that advising other companies was not the concern of the courts.

Ms. Donovan stated that the conversation she mentioned would appear to be prohibited by the proposal.

Chairman Getman stated that the lobbyist would not be involved in part of the decision-making process during a casual conversation.

Scott Hallabrin, from the Assembly Ethics Committee, stated that he was not taking a position in the matter, but noted that conflicts regulations include a definition of "making" a decision with regard to consultants. He noted that FPPC staff, years later, may analogize this issue with the conflicts regulations.

Ms. Menchaca stated that "making" under the conflicts regulations includes activities that do not fit with what a lobbyist does on a day-to-day basis.

Diane Fishburn, with Olson, Hagel, Waters and Fishburn, explained that her firm represents officeholders and candidates. She was concerned with how the candidates would know that a business entity was owned in part by a lobbyist, as well as the specific circumstances surrounding the decision to make the contribution, in order to avoid violating the prohibition against accepting the lobbyist contribution. She questioned whether the official had an obligation to ascertain the facts, noting that it would be very difficult.

Chairman Getman noted that the officeholder faces this concern all the time with regard to receiving laundered contributions.

Ms. Fishburn stated that the official or candidate has to know or has to have reason to ask with regard to laundered contributions. It is very difficult for candidates to ascertain affiliated entity status in order to comply with the affiliated entities regulations. Candidates have to go through a process now to learn about a possible affiliated entity of contributors, but there is generally something that alerts the candidate to that possibility. She was concerned that the candidates would have to write a letter to the contributor every time they receive a contribution requesting affiliated entity information.

Chairman Getman noted that Ms. Fishburn's concern presumes that a lobbyist will violate the statute.

Ms. Fishburn stated that contributions may be made under circumstances which come within the definitions that the Commission was considering. Since there is a separate legal obligation on the candidate to not accept the contribution, it was important for them to know what they needed to do to protect themselves.

Commissioner Knox presumed that there would be a distinction between candidates who knowingly accept laundered funds and those who do not know.

Ms. Fishburn stated that the administrative section of the PRA provides no specific intent requirement. Those issues are generally interpreted by the Commission through the regulatory process.

Chairman Getman suggested that if a candidate has some indication that there is a need to look further, then the candidate will have to look further. This would presume that the lobbyist will be violating the law. The Commission must presume that the lobbyist will not violate the law.

Mr. Hiltachk observed that a lobbyist's spouse can contribute to a candidate by writing a check from a joint checking account. That exception makes sense. Trying to solve the issue of a lobbying firm with a 50-50 partnership creates many problems and would not be worth it. There will only be a handful of people to whom the regulation will apply. It is similar to a husband and wife situation, and should be treated the same way.

Mr. Tocher stated that there is a presumption in the context of a marriage with the spousal exception, but noted that it does not allow the married couple to make a contribution. It simply

says that the contribution is from the person who signs the check. If there is any evidence that the lobbyist directed his or her spouse to write the check, it would constitute a violation.

Mr. Hiltachk stated that the same accommodation should be made for lobbying firms.

Commissioner Knox noted that subdivision (b) on page 2 would become subdivision (c), and questioned whether the Commission should include that language.

Commissioner Downey moved permanent adoption of regulation 18572 as revised on May 9, 2002, including the current versions of subsections a(1)(2) and (3), and with the addition of the new proposed subdivision (b) and with the deletion of the current printed version of subdivision (b).

Commissioner Knox seconded the motion.

Mr. Tocher suggested that the bracketed reference to § 85311 be deleted also.

Commissioner Downey agreed.

Chairman Getman clarified that the motion would define the "making of a contribution," and that it did not deal with the "acceptance of a contribution."

Commissioner Downey agreed.

Ms. Menchaca pointed out that the deletion of Option B, subdivision (b) and the bracketed language of § 85311 is not a decision determining that § 85311 does not definitively apply. It would not reject § 85311, but does not interpret it in the context of § 85702.

Commissioner Knox stated that the motion states that the Commission was only adopting the language as stated by Commissioner Downey and nothing more.

Ms. Wardlow requested that line 14 be changed from "owned in part," to "owned in whole or in part," so that there would be no confusion.

Commissioner Downey agreed.

Chairman Getman suggested that line 16 might also need to be changed to reflect "wholly or in part," to make it clearer.

Ms. Wardlow explained that line 17 pertains to only one lobbyist who is participating in the decision. She noted that a recipient committee made up wholly of one lobbyist's funds would not be considered a recipient committee.

Chairman Getman pointed out that it would be a major donor committee and that there would be no way to argue that this would allow a major donor committee to contribute.

Mr. Tocher read subdivision (b) as, "Nothing in this regulation shall be construed to prohibit a lobbyist from advising his or her client or lobbyist employer regarding the making of a contribution."

Commissioner Knox again seconded the motion.

Chairman Getman, Commissioners Downey, Knox and Swanson voted "aye." The motion carried unanimously.

The Commissioners agreed that staff should bring back a fuller discussion of what it means to "accept a contribution" at the June, 2002 meeting.

The meeting adjourned to closed session at 5:00 p.m.

May 10, 2002

The public session of the meeting reconvened at 9:10 a.m.

Item #7. In the Matter of Manson F. Wong, FPPC No. 97/655 (Continued).

Chairman Getman announced that the Commission in closed session voted unanimously to adopt the decision of the Administrative Law Judge in the matter of Manson F. Wong.

Item #6. Proposition 34 Update: Reporting and Recordkeeping Issues.

Senior Commission Counsel Hyla Wagner explained that the March 2002 primary election marked the first time that the limits and reporting requirements of Proposition 34 were applied. She presented a review of the implementation of Proposition 34 in that election to determine whether changes needed to be made before the November election. She explained that staff consulted with the Secretary of State's (SOS) office, Franchise Tax Board (FTB), and the head of the California Political Attorney's Association (CPAA) to determine whether there were any implementation problems that might need addressing.

Ms. Wagner stated that the issues raised consist of fairly minor reporting issues. She cautioned that additional issues could come up in the November election. Ms. Wagner noted that there are other policy issues raised by Proposition 34 with regard to independent expenditures, issue advocacy campaigning, the role of political parties in California, and the levels of the contribution and expenditure limits.

Ms. Wagner outlined the issues presented in the staff memo. She recommended that the Commission take action on a request by the SOS for a regulatory amendment that would require identification of payments on the issue advocacy disclosure form.

Chairman Getman explained that the Commission had a regulation that identified what needed to be on an electronic form, and the SOS added fields to the form that were not part of the regulation. The question of whether the SOS had the authority to do that without going through the regulatory and public comment process required for paper forms needed to be addressed.

Ms. Menchaca agreed, and recommended that the Commission study the broader issues for next year's planning purposes. For this year, staff recommended addressing the amendments requested by the SOS, and a technical amendment to the record-keeping regulation 18401. She asked the Commission for approval to proceed with the two regulatory changes and to continue working on the broader issues, specifically getting public input on forms.

There was no objection from the Commission to proceeding with the two minor regulatory changes and to explore the broader issues next year.

Turning to other issues in the staff memo, Ms. Wagner stated that affiliated committees are not shown on the forms, and that such a change might be considered.

Ms. Menchaca stated that the Commission decided not to amend any further forms this year, and that the form would not be changed until next year. She noted that it would be possible to discuss the issue this year and change the form next year.

Chairman Getman agreed that the discussion could be done this year if staff can fit it in the schedule.

Ms. Wagner stated that Jim Sutton, head of CPAA, requested that there be some way to indicate on the forms that a committee was a pre-2001 committee so that it does not mislead the public.

In response to a question, Ms. Wardlow stated that staff sent out hundreds of notices to candidates and officeholders notifying them of the committee termination requirements. There have been a few questions, and it appears as if most people understand the rule. The first termination deadline is the end of 2002. She explained that staff is researching finding people who are no longer holding office but still have open committees. Staff hoped that the instructions on the Statement of Organization could be changed so that committees are advised of the termination deadlines when they form the committee.

With respect to loans, Ms. Wagner stated that prior to Proposition 34, relatives could give large amounts to a candidate's campaign. Since they can no longer contribute above the limits, staff suggested publicizing the change.

Commissioner Swanson stated that family members of candidates commonly lend money for campaigns. She agreed that candidates needed to have the change brought to their attention.

Ms. Wagner explained that staff could examine the issue of a requirement that a late contribution report be filed on a weekend when the filing agency may not be open to receive the reports. She noted that more reports are available to be filed online.

In response to a question, Ms. Wardlow explained that there is a proposed bill that would eliminate the requirement that certain offices stay open the weekend before the election.

Chairman Getman noted that it would make it impossible to look at the report on the weekend. She noted that there was public concern about being able to look at the reports on the weekends, and that staff was going to study the issue. If the bill goes forward, it would take the issue out of the Commission's hands. She suggested that the bill be tracked, and that if the bill moves forward staff may want to have input on it.

Commissioner Swanson noted that Colleen McAndrews wrote to the FPPC expressing concern that, other than the weekend before the election, postings should not be required on weekends.

Chairman Getman stated that the issue was scheduled to be explored later in the year. She suggested that staff monitor the legislation in case it becomes necessary to explore the issue sooner.

Ms. Wagner explained that Enforcement staff did not yet know whether changes needed to be made to the record-keeping requirements as a result of Proposition 34. She suggested that it might be helpful to reference other record-keeping regulations in regulation 18401. That technical change will be presented to the Commission in June.

Ms. Wardlow explained that there are certain expenditures that count towards the limits and some that do not. If a campaign is close to the limits, FTB has said it would be helpful if campaigns kept records of which expenditures count towards the limits and which ones do not. Enforcement Division did not impose a record-keeping requirement on every state campaign if there were only a few that were accepting the voluntary limits. She stated that it would be beneficial to the campaign to keep records.

Item #5. Proposition 34 Regulations: Advertising Disclosure - Repeal of Emergency Amendments to Regulation 18402 and Adoption of Amendments to Regulation 18402; Permanent Adoption of Emergency Regulations 18450.3, 18450.4 and 18450.5; and Pre-notice Discussion of Proposed Regulations 18450, 18450.1 and 18450.2.

Mr. Tocher presented an overview of the seven regulations dealing with advertising disclosure. Four of the regulations were adopted on an emergency basis in January for the primary election, and were being brought back for adoption with little change. He presented three additional regulations for pre-notice discussion.

Mr. Tocher summarized that the Commission decided to limit the committee name identification requirements in § 84504 to primarily formed ballot measure committees. The staff memo, a video and a slide presentation illustrating advertisements for two ballot measures would be used for the discussion to address how the regulations worked in the March primary.

Mr. Tocher explained that the committee name requirement in regulation 18450.3 provided a two-step process, requiring that the economic interest of all entities who contributed $50,000 or more and the names of the two largest contributors at the time of the advertisement be included

in the advertisement. He noted that, when the economic interest cannot be identified, then the goal or purpose that would be affected by the measure must be named in the advertisement.

Mr. Tocher presented the slides of advertisements used in the March primary. During the presentation, he noted that use of the Internet will test traditional notions of advertisements. E-mail messages can be sent with advertisements and then the receiver can forward the advertisements to others. Television ads can be viewed on the Internet. Advertisements that are not necessarily broadcast are seen on a website. Stickers and signs can be printed off of a web site. He noted that there is currently no requirement that websites identify the name of the committee.

Chairman Getman stated that the regulation for disclosures on signs may need to be reevaluated, because disclosures on signs printed from the Internet could be updated more frequently if they are determined to be advertisement. She noted enforcement difficulties that would be presented if the Internet advertisements were regulated.

Mr. Tocher noted that it is difficult to determine compliance of an advertising disclosure because of the timing of the printing of the advertisement.

Chairman Getman described how record-keeping would be difficult for Internet advertising.

Mr. Tocher stated that Internet advertisements will be delivered not just by the proponent of a measure, but also in partnership with the consumer.

Chairman Getman commented that a grass-roots group, not a campaign committee, made one of the website campaign communications. They did not qualify as a committee for reporting purposes and would not have fallen under the purview of the FPPC.

Chairman Getman explained that the Commission will need to determine whether a candidate's campaign video that is forwarded over the Internet by a member of the public should be considered broadcasting over the air, and be subject to disclosure requirements.

Mr. Tocher explained the difficulties of determining whether a campaign message would be considered a mass mailing if a consumer forwards an advertisement over the Internet, taking into consideration whether the consumer includes customized introductory messages. Staff was proposing the regulation of e-mail messages.

Mr. Tocher presented videotapes of television advertisements for measures in the March primary. He noted that there were different disclosures on different advertisements for the same measure, with changes made depending on the timing of the advertisement.

Commissioner Knox noted that one of the names disclosed on one of the videos seemed to be a vague reference.

Mr. Tocher responded that it was the name of the committee.

The slide and video presentation ended.

Mr. Tocher explained that proposed regulation 18402 addressed the committee name identification requirement, which the Commission had previously determined to be applicable only to primarily formed ballot measure committees. He noted that staff received no requests for changes to the emergency regulation 18402 and that the regulation seemed to work well in the March primary. Staff proposed no changes for the permanent regulation.

In response to questions, Mr. Tocher stated that the statutory authority requiring that the committee name include the controlling candidate's name was in § 84504(d). Subsection (c)(3) requires that the committee sponsoring the advertisement must include in its name the name of the candidate whose controlled committee is contributing $50,000, and that subdivisions (b) and (c)(3) require the same thing. He stated that "committee name" in subdivision (c)(3) refers to the primarily formed committee.

Commissioner Knox stated that § 84504(d) appears to mean that a controlled committee that contributes to the primarily formed committee and must be identified as a major donor, must be identified by the name of the candidate or officeholder who controls the committee. Subdivision (c)(3) of the regulation requires that the name of the candidate be included in the name of the primarily formed committee.

Mr. Tocher agreed with Commissioner Knox's interpretation of subdivision (c)(3) of the regulation.

Chairman Getman stated that she read (c)(3) to refer to the candidate's committee name.

In response to a question, Mr. Tocher stated that controlled committees do not currently have to include the candidate's name in the committee name. He explained that (c)(3) would require that the controlled committee of an officeholder would have to be identified with the officeholder's name included in their name.

Commissioner Knox stated that § 84504(d) requires that when the officeholder's controlled committee donates and is a major donor, they would have to be listed as a major donor. However, the officeholder's name does not have to be in the name of the committee. He agreed that § 84504(d) required that the officeholder be identified, but questioned whether the identification had to occur in the name of the committee or in the identification of the major donors.

Chairman Getman questioned whether the issue arose because § 84504 was being restricted to primarily formed ballot measure committees.

Mr. Tocher responded that the question was whether it was the officeholder's committee or the ballot measure committee that the statute addressed. He read "they" in subdivision (d)'s last clause to refer to the identification of the ballot measure committee.

Chairman Getman stated that she read it to describe the major donor committee. She pointed out that it pertains to an entity meeting the contribution thresholds for a person. The only time the contribution thresholds for a person matter is when determining whether the $50,000 threshold has been met for major donor designation. She believed that (d) is supposed to mean that if the major donor thresholds have been met by a candidate controlled committee, the candidate's name must be in the controlled committee's name because that is how it will be identified in the ballot measure advertisement.

Ms. Wardlow stated that it would create two changes. If the officeholder did not have his name in the name of the committee, and the officeholder decides to give $50,000 to a ballot measure committee, the officeholder would have to change the name of his or her committee so that the ballot measure committee can correctly identify the officeholder. She believed that was not intended, but rather, it was intended to make the ballot measure committee identify the officeholder as a major donor.

Chairman Getman questioned how the ballot measure committee would know that the controlling candidate was the major donor if the contribution came from the committee, and the candidate's name was not included in the committee name.

In response to a question, Mr. Tocher stated that (d) intended to have the controlling candidate's name included, but agreed that it depended on the definition of the word "they."

Commissioner Knox questioned whether the controlling candidate should be identified in the name of the primarily formed committee or as a major donor.

Chairman Getman responded that (c) provides that identification of committees must include the full name as required in the Statement of Organization. If the Commission does not require that the committee name be changed then they cannot comply with the regulation.

Commissioner Knox stated that (c)(3) of the proposed regulation may overreach the provision of the statute to the extent that it requires that the name of the controlling candidate be in the name of the primarily formed committee. He noted that those committees would have to change their name often.

Commissioner Knox further stated that he saw no reason to include the candidate's name in the name of the primarily formed committee.

Chairman Getman agreed, but believed that the candidate's name should be in the name of the controlling candidate's committee as a donor.

Commissioner Knox noted that (c)(3) would then have to be rewritten.

Chairman Getman stated that it would also mean that § 84504 does not apply just to primarily formed ballot committees, but also to any committee that makes a donation of $50,000 or more to a primarily formed ballot measure committee.

Commissioner Knox agreed that it would apply to a controlled committee that makes a donation, but he did not believe that it would be inconsistent with anything the Commission had done.

Mr. Tocher suggested that subdivision (c)(3) could be deleted in order to adopt the regulation.

Ms. Menchaca stated that § 84504(a) requires that the committee supporting or opposing one or more ballot measures name and identify itself. Staff believed that subdivision (d) referenced that provision, and did not necessarily mean to include it in the regulation. She agreed that the primarily formed ballot measure committee name should include the name of a controlling candidate. She noted that there is nothing that would prevent a candidate from controlling a ballot measure committee, and limiting it to ballot measure committees would not alter that. When a candidate is involved, the additional requirement would be triggered.

Mr. Tocher stated that the general rule in subdivision (a) requires that the economic interest of the major donors be included. Subdivision (d) creates an exception to that, requiring that the candidate's name be used in the primarily formed committee's name if the thresholds of subdivision (a) are met.

Commissioner Knox stated that Mr. Tocher's interpretation would be consistent with the language of the statute, but noted that it could necessitate a change in the name of the primarily formed committee depending on who had contributed most recently.

Mr. Tocher responded that the name change had always been a possibility under the advertising statutes.

Chairman Getman noted, from comments at the interested persons meeting after the March primary, that consultants and attorneys had figured that out in advance and arranged the funding so that the committee name would not change.

Commissioner Knox stated that the name of a legislator would have to be put in the committee name. He noted that the public would still get the information if the legislator was named as a major donor.

Mr. Tocher responded that, under (c)(3), a legislator would not be identified in the advertising disclosure language unless the legislator was one of the top two donors.

Chairman Getman questioned why the ballot measure committee would have to change its name just because a candidate may happen to be the sixteenth largest funder.

Mr. Tocher speculated that, if a measure had major legislative supporters, the public would want to know.

Chairman Getman stated that a candidate who gives $50,000 to a ballot measure committee may be giving much less than other entities, and yet the name of the committee would have to be changed to include the candidate's name. That would not be accurate disclosure. She suggested

that it would be more accurate to require that, if one of the two top funders happens to be a candidate's controlled committee, the name of the candidate must be in the name.

Mr. Tocher observed that if the name is not included, the legislator's economic interest would be ascertained according to regulation 18450.3.

Trudy Schafer, from the League of Women Voters of California, stated that (d) seemed to be providing that, in the case of candidates, they must be named in the primarily formed committee's name.

Commissioner Knox left the meeting at 10:32.

Commissioner Downey presented a hypothetical scenario wherein a committee makes a donation to a primarily formed ballot measure committee, and under § 84504(a), the committee's economic interest must be identified in the name of the primarily formed ballot measure committee. He questioned how subdivision (d) would apply.

Mr. Tocher responded that there were two views: The primarily formed committee name must include the proper name of the candidate; or the candidate's controlled committee that makes the contribution must contain the candidate's name.

Commissioner Downey noted that § 84504(d) ends using the word "identified." The word "identify" is initially used in subdivision (a), where it clearly references the primarily formed committee. The repetitive use of the word would support the interpretation that it applies to the primarily formed committee.

Chairman Getman noted that "they" can only refer to candidates or their controlled committees.

Commissioner Knox returned to the meeting at 10:35 a.m.

Ms. Wardlow stated that it would be less confusing to read it as applying to the name of the primarily formed committee.

Chairman Getman pointed out that the primarily formed ballot committee would have to be advised that whenever they got a $50,000 contribution from a committee they will have to determine whether the committee is candidate controlled. If the committee is candidate controlled, the ballot measure committee will need to know that they have to use the candidate's name.

Commissioner Downey suggested that a contributor of $50,000 would have some sort of communication with the ballot measure committee.

Ms. Wardlow responded that, under subdivision (b), when several business entities were major donors of $50,000 or more, the committee would have to determine whether they shared a common employer.

Chairman Getman summarized that § 84504 requires that committees find out where contributions of $50,000 originate from and ascertain how to identify the contributors.

In response to a question, Chairman Getman stated that, if (c)(3) is intended to refer to the primarily formed ballot measure committee, staff would need to clarify it.

Ms. Menchaca suggested that lines 16 through 20 of proposed regulation 18402 should included as subdivisions (2)(A) and (2)(B), so that it is clearly under that subsection.

Chairman Getman suggested that, in addition to Ms. Menchaca's suggestion, the language be more specific and include "primarily formed committee."

Mr. Tocher suggested that "committee" on line 17 be changed to read, "primarily formed committee," and that subdivisions (3) and (4) be changed to (2)(A) and (2)(B).

Ms. Menchaca suggested that the language on line 20 be similarly changed to read, "of the employer shall also be disclosed in the name of the primarily formed committee."

Commissioner Knox questioned whether the statute intended to require that the employer would be disclosed as a major donor.

Chairman Getman responded that § 84504 is all about the naming of the committee, and that a separate section addresses the donors.

Commissioner Knox suggested that the additional language suggested by Ms. Menchaca be included.

Chairman Getman moved the repeal of former regulation 18402, and permanent adoption of emergency regulation 18402 with the following changes:

- Line 16: (3) changes to (A).
- Line 17: "primarily formed" is inserted after the word, "the."
- Line 19: (4) changes to (B).
- Line 20: "in the name of the primarily formed committee" be inserted before the period.
-

Commissioner Swanson seconded the motion.

Chairman Getman, Commissioners Downey, Knox, and Swanson voted, "aye." The motion carried by a vote of 4-0.

Mr. Tocher explained that staff proposed a minor change to regulation 18450.3, as adopted in January. The change would eliminate subdivision (d), because it was not germane. Subdivision (b)(1) described the two-step process for naming the committee. It would first look to the ascertainable economic interests, and if none exists, the name shall identify the shared goal or purpose of the contributors. He noted that this took the most staff time in helping the regulated

community determine how to comply with the regulation during the March primary. Staff did not propose any changes to the process and had received no comments requesting changes.

In response to a question, Mr. Tocher stated that the language would be consistent with regulation 18402 as just adopted.

In response to a question, Mr. Tocher stated that regulation 18450.4 would deal with disclosure of the top two donors.

Commissioner Downey moved that the Commission permanently adopt regulation 18450.3.

Commissioner Knox seconded the motion.

Chairman Getman, Commissioners Downey, Knox and Swanson voted, "aye." The motion carried by a vote of 4-0.

Mr. Tocher stated that regulation 18450.4 dealt with the content of disclosure statements. The only proposed change dealt with whether the $50,000 threshold should be imported into § 84506. If the Commission decided to continue to apply the threshold, staff proposed that the Option A language be included. If not, Option B would provide that the two contributors whose cumulative contributions are the largest during the 12-month period prior to an election must be disclosed. He explained why the Commission decided to adopt Option A in the emergency regulation in September 2001.

Chairman Getman expressed her concern about disclosing the proper name of the major donor that is a committee. If it is a committee, she questioned whether the Commission had the authority to require that the committee be disclosed as such. She noted that, with some of the groups that look like "good government" groups and are actually committees, it is possible to find out who their donors are. If they are not identified as a committee, they might be perceived as a major donor but not a political committee.

Commissioner Downey agreed that it was deceptive.

Kathy Donovan stated that it would be helpful for major donor committees to know that they do not have to indicate "committee" after the name of the company.

Chairman Getman clarified that she was referring to recipient committees, and noted that some of the advertisements in the slides presented by Mr. Tocher indicated groups that were, in fact, recipient committees. She suggested that a "committee" designation could be required in regulation 18450.4.

Mr. Tocher suggested that the language, "In the case of a contributor that is a committee pursuant to Government Code section 82013(a), the word "committee" shall be included in the disclosure," be added at the end of line 13.

There was no objection to the additional language.

Chairman Getman suggested that "television" on line 18 be changed to "video." She stated that it could include Internet video advertisements that are sent through the mail.

Commissioner Swanson stated that videos and cd's are projected on a television, and suggested that "television" was sufficient. She opposed language that would restrict use of computers.

Chairman Getman explained that she received a video on a CD that could have been played on the computer, and questioned why that should not be treated the same as a video that could be played on a television.

Commissioner Swanson responded that she was troubled by any effort that would encroach on freedoms with regard to computer use. She did not want to see controls placed on people who want to communicate with a friend regarding a candidate or measure.

Commissioner Knox noted that DVD's can be played on either televisions or computers.

Ms. Menchaca suggested that the Commission revisit the issue after they have had a chance to determine whether they want to notice a regulation to define "advertisement." If the Commission chooses not to define "advertisement" through a regulation, she suggested that the Commission might wish to change other references in the subsections.

Chairman Getman stated that if the Commission limits the language of the regulation to "television" and "radio," it would preclude the Commission from including the Internet later unless they go back and change the regulation.

Commissioner Swanson stated that disclosure on advertisements regarding candidates or measures is appropriate. She would vote against any regulation that would impede her ability as a citizen to communicate her political ideas to friends on her computer.

Mr. Tocher responded that the Commission will face that issue in a different regulation, defining "advertisement." By changing the word "television" to "video" and "radio" to "audio" in regulation 18450.4, it would keep from limiting the disclosures that the Commission requires elsewhere. It would not preclude nor even push the Commission into a decision with regard to Internet and computers.

Commissioner Knox noted that the language of proposed regulation 18450.1, "includes but is not limited to," could leave open the possibility of regulating the Internet. He suggested that forwarding a video advertisement on the Internet could be included under 18450.1.

Commissioner Downey suggested that it be specifically noted that the regulation pertains only to the committee or persons that paid for the communication. It should not pertain to the individual who received the regulated communication and passed it along to a friend. He believed that the proposed language would accomplish that.

Chairman Getman agreed. She noted that Commissioner Swanson's concerns involved major policy issues that the Commission will have to address. If the Commission uses the "television" and "radio" language, it narrows the regulation too much. She agreed that personal political activity on the Internet should not be regulated, but thought some restrictions would be necessary. She believed that she had a right to know who sent a political advertisement on video to her.

Commissioner Swanson stated that "audio" and "visual" includes much more than "television" and "radio."

Chairman Getman agreed, and noted that a television advertisement on CD ROM would not be included if the language was narrowed to "television" and "radio."

Ms. Menchaca noted that the regulation would not address what disclosure obligations, if any, a recipient of that type of communication would have.

In response to a question, Ms. Menchaca stated that if the Commission adopted 18450.4, changing "television" to "video" and also adopted the definition of "advertisement" in 18450.1, it would not create disclosure requirements for a person who downloads a political advertisement video and then forwards that video to a friend. Those disclosure requirements would have to be considered in another regulation that the Commission may or may not wish to pursue.

Commissioner Knox supported the language change as long as it did not result in a disclosure requirement for persons sending advertisements to friends.

Commissioner Swanson agreed. She noted that the regulation requires that the disclosure be clearly audible and questioned why a disclosure on a radio advertisement must last three seconds.

Mr. Tocher responded that it was intended to prevent the disclosure from being spoken so quickly that it would be difficult to understand. He was not sure that the disclosure could be made within three seconds. He agreed that the disclosure is an imposition, but noted that staff had not received any complaints about the three-second requirement.

Commissioner Swanson favored a disclosure, but thought that requiring that the disclosure be "clearly audible" was sufficient.

Chairman Getman noted that it is difficult to read the disclosures on billboards, but did not know of a better way to regulate them.

Commissioner Downey moved that regulation 18450.4 be adopted, including the language in Decision 1 Option A, and altering the subtitle of (b)(1) from "Television" to "Video," and (b)(2) from "Radio" to "Audio."

Chairman Getman suggested that the motion be amended to add to line 13, "In the case of a contributor that is a committee pursuant to Government Code section 82013(a), the word "committee" shall be included in the disclosure."

Commissioner Downey agreed to amend the motion as suggested.

Commissioner Knox seconded the motion.

Chairman Getman, Commissioners Downey, Knox and Swanson voted "aye." The motion carried by a vote of 4-0.

Mr. Tocher explained that emergency regulation 18450.5 governed the amendment of advertisements. Staff did not propose any changes to that version for the permanent regulation.

In response to a question, Mr. Tocher stated that the five calendar days included on line 8 of the proposed regulation were discussed by the Commission in January. No one indicated that it created an insurmountable problem at the interested person's meetings.

Chairman Getman noted that committees worked around the emergency regulation, making sure that there would not be a committee name change that would require a disclosure change. She stated that she was reluctant to adopt the regulation until after the Commission had some initial discussions about advertisements on the web site. If printed materials are being downloaded from a web site, the Commission would need to decide whether that is or is not to be regulated. If it is included, the language on print media would not work in the proposed regulation.

Mr. Tocher suggested that the Commission may want to consider a requirement to date printed materials, so that there would be a way to determine whether advertisements are in compliance with the regulations.

Commissioner Downey noted that, if the Commission decides to regulate electronic advertising, more subdivisions in the regulation would be necessary. He suggested that (b) be amended to add the language, "other than electronic advertisements."

There was no objection from the Commission.

Ms. Menchaca noted that, if the Commission decided not to include electronic advertisments at a later date, the regulation might have to be amended to delete the language so as not to lead people to think that electronic advertisements are regulated.

Mr. Tocher stated that proposed regulation 18450.1(a)(3) defined "advertisement," and was developed using the experience of the March primary and on an interested person meeting. The language of Decision 1 was developed to address the issue of electronic messages not solicited by the recipient and intended for delivery ("spam").

Chairman Getman explained that the Bill Jones campaign sent out unsolicited e-mail the weekend before the election, and the Internet service provider (ISP) shut down the web site for

sending "spam" e-mail. That precluded the campaign from having web site capability the weekend before the election. She noted that the California Code defined "spam" to include commercial advertisements. The ISP considered the Bill Jones e-mail to be spam, but the Jones campaign did not. The Commission may want to consider addressing whether a candidate or committee's web site must have disclosure under the Act, giving the viewers of a web site information about who the site represents, and also giving the web site some protection. She did not know whether the Internet Commission would be considering it.

Commissioner Knox suggested that the Commission wait until the Internet Commission had the opportunity to deal with it.

Commissioner Downey stated that computers are great tools for campaigns, and suggested that their use would grow rapidly for campaigns. He believed that it was the FPPC's job to determine whether such use should be regulated. He believed that the language in proposed regulation 18450.1(a)(3) was a form of advertisement subject to the regulations. He believed it should be limited to those persons who develop and fund those advertisements, and not the persons who may wish to forward the advertisements.

Commissioner Swanson stated that disclosures should be made. If the regulations would protect the public, it would be appropriate. She did not want to be prohibited from being able to send an advertisement to friends when the advertisement had a disclosure on it. She was concerned that the Commission might inadvertently prohibit people from disseminating information as they please.

In response to a question, Mr. Tocher stated that he did not believe that § 84501(a) would prevent anyone from forwarding an advertisement to 500 friends.

Chairman Getman stated that informal advice had already addressed the issue of the cost of using the computer. She noted that the FEC originally stated that a person who sends out computer messages or sets up a computer web site must attribute part of the cost of that, but the ruling caused huge problems.

Chairman Getman suggested that web sites that provide signs and posters that can be downloaded be considered an advertisement. People will want to know that it is an official campaign web site, and that the materials available are accurate. However, updating, archiving and record-keeping make it different than the advertisements the regulations currently address. She was troubled that a third-party vendor was able to take away a candidate's right to speak the weekend before an election, and believed that the Commission may want to step in so that the low-cost means of communication can be used. The Internet Commission and the Federal Election Commission were working with the issues, and the FPPC was not yet receiving complaints about the issue. She suggested that it would be better to wait until the Internet Commission and the FEC had a chance to work with the issues.

In response to a question, Chairman Getman suggested that the reference to electronic messages in proposed regulation 18450.1(a)(3) be deleted, and that the Commission revisit the issue after the FEC and the Internet Commission have worked with it. She believed that if the Commission

chose to deal with the issue now, they would be working on the issue for the next year because it is so complex.

In response to a question, Commissioner Knox stated that "facsimile" should be left in the language.

Mr. Tocher suggested that the language of (a)(3) read, "A telephone or facsimile message."

Chairman Getman suggested that the issue be brought back to the Commission next fall.

Mr. Tocher recommended the threshold of 200 for Decisions 2, 3, 4 and 5, noting that it is the existing number that the FPPC uses in the definition of mass mailing. He explained previous discussions by the Commission, noting that he did not find a final recommendation by the Commission. He observed that, if it is not practical for a campaign to produce less than 200 items, the threshold would work well for subdivision (4).

In response to a question, Mr. Tocher stated that videotapes and CD's would be included under (4). He noted that different thresholds in the Decisions 2, 3, 4 and 5 would create problems.

There being no objection, the Commission decided to bring back regulation 18450.1 for adoption, with the changes indicated, and using a threshold of 200 in each decision.

Mr. Tocher stated that the Commission will probably not need the additional suggested language of 18450.5 "other than electronic advertisements" and suggested that the regulation be adopted as written.

Commissioner Downey noted that the, "includes but is not limited to," language in regulation 18450.1 might suggest that the regulations include electronic messages.

Chairman Getman suggested that, when regulation 18450.1 is brought back for formal adoption, staff consider language that would clarify that it does not include electronic media.

Chairman Getman moved adoption of regulation 18450.5 without change.

Commissioner Downey seconded the motion.

Chairman Getman, Commissioners Downey, Knox and Swanson voted, "aye." The motion carried by a vote of 4-0.

Mr. Tocher stated that proposed regulation 18450 would define the scope of the regulations that define advertising and committee naming disclosure requirements. The regulation would provide that Sections 84503 and 84504 apply only to primarily formed committees. The Commission would need to decide whether the "any advertisement" language of § 84503 means advertisements by any committee or whether it can be limited to primarily formed committees.

Mr. Tocher noted that the Commission has determined that the "any committee" language of

§ 84504 can be limited to apply to primarily formed committees. If applied to § 84503, it would limit unnecessary or misleading disclosures of contributors who donated a long time ago but are not actually connected with the advertisement being produced. If the Commission wanted to apply it to all committees, "cumulative contributions" could be defined in a way that would narrow the number of persons that it would apply to. If the Commission chose to limit § 84503 to primarily formed committees, then they may not have to address the cumulative contribution issue.

In response to a question, Mr. Tocher stated that, if the Commission followed staff's recommendation to limit § 84503 to primarily formed committees, then independent expenditure disclosures would be made under § 84506. Recipient committees, general-purpose committees and candidate-controlled committees that are not making independent expenditures could make ballot measure advertisements without disclosure.

In response to a question, Ms. Wardlow explained that a political party state committee that finances an advertisement supporting or opposing a proposition would not have to make a disclosure if they were making it as a contribution to the ballot measure committee. If they made it as an independent expenditure, it would have to be reported under § 84506.

Chairman Getman pointed out that preexisting political action committees would not have to make the disclosure either.

In response to a question, Ms. Wardlow noted that when contributions were made by a political party committee at the behest of a primarily formed committee to finance an advertisement, disclosure would not be required by the political party committee. However, the primarily formed committee would have to disclose the political party committee as a contributor.

In response to a question, Mr. Tocher stated that federal law requires that the committee identify itself in the advertisement. He did not know whether the committee name identification or the two largest contributors would have to be identified.

Chairman Getman stated that the Commission would have to do an injustice to either § 84503 or § 84502. She suggested that if the injustice were done to § 84502, they would meet the intent of getting far-reaching disclosures in advertisements.

Mr. Tocher responded that staff recommended a rewrite of § 84503 because it was less expressly contradictory than the other. It would be consistent with the limitation of § 84504, and he did not think it was unprecedented. He did not dispute that there is a viable alternative.

Commissioner Swanson left the meeting at 12:06 p.m.

Commissioner Downey stated that § 84503 includes all committees, and suggested that if it were left as is, there would not be a problem until cumulative contributions became an issue. He noted that if § 84502 is amended it would allow § 84503 to apply to appropriate situations. He believed it was inappropriate to change § 84503.

Mr. Tocher agreed, and noted that the Commission could also read both §§ 84503 and 84502 as written. If an absurdity results, the Commission could conclude that the Legislature must correct the problem.

Commissioner Knox stated that he was not comfortable having to choose between two statutes.

Commissioner Downey responded that the Commission could ask the Legislature to fix the statute and not choose between the two statutes.

Chairman Getman suggested that staff bring the regulations back as they are, and that staff ask the Legislature to include a fix to the cumulative contribution issue in one of their pending bills.

Ms. Menchaca noted that there is a bill pending that purports to amend § 84506 and could be a vehicle to change § 84502.

In response to a question, Chairman Getman advised staff that the Commission would like a legislative change limiting § 84502 to 12 or 24 months back, if it involves a long-standing recipient committee.

Mr. Tocher noted that § 84506 used a one-year period to aggregate contributions.

In response to a question, Mr. Tocher stated that proposed regulations 18450 and 18450.2 would come back to the Commission for consideration at the July 2002 meeting.

The Commission meeting was adjourned at 12:15 p.m.

Dated: June 7, 2002

Respectfully submitted,

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Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman